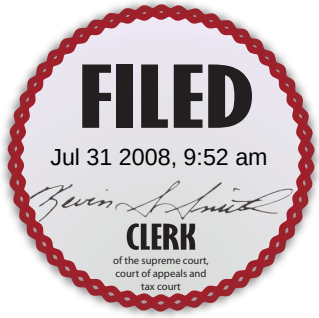

ATTORNEY FOR APPELLANT:

DEIDRE L. MONROE
Public Defenders Office
Gary, Indiana

ATTORNEY FOR APPELLEES:

YOLANDA HOLDEN
Robert L. Lewis & Associates
Gary, Indiana

IN THE
COURT OF APPEALS OF INDIANA

In re the matter of the Termination of the Parent-Child Relationship of L.B., minor child, and David L., father,	)	
DAVID L.,	)	
Appellant-Respondent,	)	
vs.	)	No. 45A03-0802-JV-82
LAKE COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
The Honorable Katherine Garza Bishko, Referee
Cause No. 45D06-0709-JT-181

July 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

David L. ("Father") appeals the involuntary termination of his parental rights to his daughter, L.B. Father raises two issues on appeal, which we restate as:

I. Whether Father was denied due process during the proceedings; and

II. Whether the juvenile court's judgment terminating Father's parental rights to L.B. is supported by clear and convincing evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

Father is the biological father of L.B., born on March 18, 2000. The facts most favorable to the judgment reveal that on or about August 17, 2006, the Lake County Division of Child Services ("LCDCS") received a referral alleging that then six-year-old L.B. had been left in the care of her maternal aunt for two months, allegedly so that L.B.'s mother ("Mother") could enter a drug rehabilitation program; however, Mother never returned to retrieve L.B. The LCDCS had also been informed that Mother had "an extensive history of addiction to heroin" and that she and L.B. had previously been homeless and living on the streets of Chicago, Illinois. *Tr*. at 8. The LCDCS initiated an investigation and substantiated the allegations. Consequently, L.B. was made a temporary ward of the LCDCS but was allowed to continue residing with her maternal aunt.

Despite their absence, on September 26, 2006, the trial court issued a detention order requiring both parents to participate in the following services: (1) a drug and alcohol evaluation and any recommended treatment; (2) individual counseling; (3)

parenting classes; and (4) random drug screens for a period of six months. Father was also ordered to establish paternity of L.B.

The LCDCS subsequently filed a petition alleging L.B. to be a child in need of services ("CHINS").[1] On November 13, 2006, the juvenile court held an initial hearing on the CHINS petition. Mother was present at the hearing and admitted to the allegations of the CHINS petition. Father did not appear. The juvenile court's order on the CHINS initial hearing, issued November 13, 2006, stated that adequate service of process was made on both parents; however, the method employed for effectuating service on Father was not indicated. The court's order also indicated that the juvenile court had found L.B. to be a CHINS, retroactive to September 26, 2006.

In order to achieve reunification, the court ordered Mother to comply with various services; however, Mother's participation was "inconsistent" and she "didn't really comply." *Tr*. at 11. Additionally, Mother had several positive drug screens for cocaine and opiates. Father never contacted the LCDCS, never established paternity, and never participated in court-ordered services. Additionally, Father's whereabouts remained unknown throughout the proceedings.

Due to Mother's non-compliance and Father's unavailability, on September 12, 2007, the LCDCS filed a petition to involuntarily terminate both parents' rights to L.B. The petition indicated that Father's address was "Unknown." *Appellant's App.* at 13. On

[1] Unfortunately, the record does not contain a copy of the CHINS petition thereby frustrating our review.

September 13, 2007, the LCDCS, via the Sheriff's Department, sent notification of the termination hearing to Father at the Arizona State Prison in Kingman, Arizona.

The termination hearing commenced on December 13, 2007. Neither Mother nor Father appeared. At the beginning of the hearing, the juvenile court confirmed that both parents had been served. With regard to Father, service was made via publication and by mail, at the Arizona State Prison. At the conclusion of the termination hearing, the juvenile court terminated Father's parental rights to L.B. This appeal ensued.[2]

DISCUSSION AND DECISION

I. Due Process

Father argues on appeal that his constitutional right to due process was violated during the underlying CHINS and termination proceedings. Specifically, Father asserts his right to due process was trampled on because "he was never appointed an attorney to represent him in the CHINS proceedings or [t]ermination proceedings, even though the Court knew he was in prison." *Appellant's Br.* at 4. He further states, "Moreover, the Court never issued an [o]rder to [t]ransport [Father] from the Arizona State Prison, even though he was served there." *Id.*

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*. It is well settled that the right to raise one's own child is an "essential, basic right that is more precious than property

[2] Mother's parental rights were also terminated; however, Mother does not participate in this appeal.

rights." *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. Thus, when a state seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of the due process clause. *Lawson v. Marion County Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). "Although due process has never been precisely defined, the phrase embodies a requirement of 'fundamental fairness.'" *E.P. v. Marion County Office of Family & Children*, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26, 101 S. Ct. 2153, 2159 (1981)).

The "right to appointment of counsel as a due process protection is not absolute." *In re M.M.*, 733 N.E.2d 6, 9 (Ind. Ct. App. 2000); *see also Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035, 1038 (Ind. 2004) (stating that U.S. Constitution does not require appointment of counsel in every parental termination proceeding). Rather than incur the time and money to litigate eligibility for public counsel in each case, Indiana has chosen to provide counsel in *termination proceedings* to all parents who are indigent. *Id.* at 1039; *see also* IC 31-32-4-1. With regard to CHINS proceedings, however, although a juvenile court has discretion to appoint counsel for a parent in any juvenile proceeding, *see* IC 31-32-4-2(b), no statute provides a parent the absolute right to court-appointed counsel in CHINS proceedings. *In re R.R.*, 587 N.E.2d 1341, 1345 (Ind. Ct. App. 1992); *see also In re G.W.B.*, 776 N.E.2d 952, 955 (Ind. Ct. App. 2002) (stating that because parent's rights are not terminated in CHINS proceedings, this court has previously held that parents do not have same statutory right to counsel that they have in termination proceedings); *but see* IC 31-34-4-6(a)(2)(C) (requiring appointment of

counsel to *indigent* parent upon parent's *request* when child alleged to be in need of services is temporarily taken into custody prior to detention hearing). Failure to appoint counsel in either CHINS or a termination proceeding will be reviewed only for an abuse of discretion. *In re Johnson*, 415 N.E.2d 108, 111 (Ind. Ct. App. 1981); *Smith v. Marion County Dep't of Pub. Welfare*, 635 N.E.2d 1144, 1149 (Ind. Ct. App. 1994), *trans. denied*.

A. Appointment of Counsel – CHINS Proceedings

Whether a juvenile court abuses its discretion in failing to appoint counsel in a CHINS proceeding depends on the "unique facts and circumstances of each case." *M.M.*, 733 N.E.2d at 11. "'If lack of counsel is likely to lead to particularly damaging uncontested allegations and if such allegations be deemed established and not subject to subsequent challenge, those allegations might virtually assure a subsequent termination decision.'" *Id*. (quoting *E.P.*, 653 N.E.2d at 1033.). In such situations, the juvenile court "might well abuse its discretion by failing to appoint counsel for an indigent parent." *M.M.*, 733 N.E.2d at 11.

Initially, we observe Father did not provide us with any portion of the record demonstrating that he ever alleged or proved that he was indigent under IC 34-10-1-1, Indiana's indigent statute, which may have entitled him to court-appointed counsel. Failure to develop and provide cogent argument as to this issue preserves nothing for review. *Smith*, 635 N.E.2d at 1149. Moreover, the record reveals that L.B. was found to be in need of services because the whereabouts of both Father and Mother were unknown, and thus, Father was unavailable to parent L.B. On appeal, Father fails to

direct our attention to any specific unchallenged allegation in the CHINS petition that was particularly damaging and, which, as such, assured the subsequent termination decision because it was left unchallenged. Rather, the record reveals it was Father's continued incarceration at the time of the termination hearing, coupled with his failure to establish paternity and to avail himself of court-ordered services, that eventually led to the termination of his parental rights.

We further observe that Father has failed to demonstrate how he was prejudiced when the juvenile court did not appoint counsel to represent him during the CHINS proceedings inasmuch as he has not shown that the termination hearing would have produced a different result had he been so represented. "One who seeks to disturb a trial court's judgment must affirmatively show an erroneous ruling and prejudice resulting therefrom." *Id.* This Court does not presume prejudice, and absent such a showing, we will not disturb the juvenile court's ruling. Based on the foregoing, we conclude that the juvenile court did not commit reversible error in failing to appoint counsel to represent Father during the CHINS proceedings. We now turn to Father's allegation that he was denied due process of law during the termination proceedings.

B. Appointment of Counsel - Termination Proceedings

Father also claims he was denied due process of law because he was not present or represented by counsel during the termination hearing. This due process argument is likewise unavailing.

A parent does not have a constitutional right to be physically present at a final termination hearing. *C.C.*, 788 N.E.2d at 853. However, as stated previously, Indiana

has chosen to provide counsel in termination proceedings to all parents who are indigent. *Baker*, 810 N.E.2d at 1038. IC 31-32-2-5 provides, "A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." IC 31-32-4-3 further explains that if a parent in a termination proceeding does not have an attorney "who may represent the parent without a conflict of interest," and if the parent has not "lawfully waived [his or her] right to counsel[,] under IC 31-32-5 . . . the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time." Thus, Father may have been entitled to representation at the termination hearing. We must therefore consider whether the juvenile court committed reversible error by failing to appoint counsel for Father.

A review of the record reveals that notice of the termination hearing to both parents was made via publication on September 27, October 4, and October 11, 2007. Father was also sent a summons to appear and a copy of the involuntary termination petition, via certified mail, at his last known address at the Arizona State Prison in Kingman, Arizona. Moreover, the attorney for the State informed the juvenile court that he had received the "green card" which was "signed as being received." *Tr*. at 5.

Despite having received proper notice of the termination hearing, there is no evidence in the record to suggest Father ever took any steps to secure his attendance at the termination hearing, either in person or telephonically. Nor did Father request a continuance to do so. Also, nowhere does there appear to be a request for court-appointed counsel due to Father's indigent status. Absent such a request, and in light of the evidence, we conclude that the juvenile court did not abuse its discretion in failing to

appoint counsel and in proceeding with the termination hearing without securing Father's presence. *See In re A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1998) (concluding that because father failed to appear, trial court was not obligated to inform him of his statutory right to be represented by counsel and did not err in failing to appoint counsel for father); *In re C.B.*, 616 N.E.2d 763, 770 n.4 (Ind. Ct. App. 1993) (stating that right to be present at any hearing concerning child is waived by that person's failure to appear after lawful notice); *see also In re S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004) (determining that trial court did not violate father's right to due process when court failed to secure his presence during CHINS hearings where record indicates that father never filed motion for transport to CHINS hearings).

II. Clear and Convincing Evidence

Finally, Father argues the LCDCS failed to prove by clear and convincing evidence each statutory element of IC 31-35-2-4(b)(2), as is required for the involuntary termination of parental rights. Specifically, Father claims the LCDCS failed to prove that the conditions resulting in L.B.'s removal and continued placement outside Father's care would not be remedied, and that continuation of the parent-child relationship poses a threat to L.B.'s well-being.

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d

258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*.

Here, the juvenile court made specific findings in terminating Father's parental rights. Where the juvenile court enters specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). Second, we determine whether the findings support the judgment. *Id.* In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the court's conclusions or the conclusions do not support the judgment thereon. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, the juvenile court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *K.S.*, 750 N.E.2d at 837. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.* at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

> (A) one (1) of the following exists:
>
> > (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> * * *
>
> (B) there is a reasonable probability that:
>
> > (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> >
> > (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

IC 31-35-2-4(b)(2). The State must establish each of these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992).

We pause to note that IC 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, although the juvenile court found both prongs to be satisfied in the present case, it was only obligated to find one of the two requirements of subsection (B) was proved by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209.

When considering whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his or her child at the

time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *M.M.*, 733 N.E.2d at 13. The LCDCS is not required to rule out all possibilities of change; rather, it need establish "only that there is a reasonable probability that the parent's behavior will not change." *In re Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining there was a reasonable probability Father's behavior will not change and that the conditions resulting in L.B.'s removal and continued placement outside Father's care will not be remedied, the juvenile court made the following pertinent findings:

> There is a reasonable probability that the conditions resulting in the removal of the child from her parents' home will not be remedied in that:
>
> * * *
>
> Father's last known address is prison. Father did not comply with the case plan. Father is a putative father and paternity has not been established. Neither parent is providing any financial or emotional support for the child. Father or his relatives have failed to contact [LCDCS] to inquire about [L.B.].

Appellant's App. at 2. Our review of the record reveals there is clear and convincing evidence supporting the juvenile court's findings set forth above. These findings support the juvenile court's ultimate decision to terminate Father's parental rights to L.B.

The record reveals L.B. was removed from her parents' care in September 2006 because Mother had failed to retrieve her from a relative's care after two months, and

because Father's whereabouts were unknown. Father's whereabouts remained unknown throughout the duration of the CHINS proceedings. Sometime after the filing of the termination petition, it was discovered that Father had been, and continued to be, incarcerated at the Arizona State Prison in Kingman, Arizona. At the time of the termination hearing in December 2007, Father remained incarcerated and was therefore still unavailable to parent L.B., and the record is silent as to Father's earliest possible release date. Thus, the "condition" resulting in L.B.'s removal from Father's care, namely, Father's unavailability due to his incarceration, still had not been remedied. As stated previously, in determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his child *at the time of the termination hearing*. *D.D.*, 804 N.E.2d at 266.

We further observe that Father failed to complete any of the dispositional goals set during the underlying CHINS proceedings, including a drug and alcohol evaluation and any recommended treatment, individual counseling, parenting classes, and random drug screening. Father also failed to initiate any contact whatsoever with the LCDCS caseworker, Cherlyn Williams, even after receiving notification of the termination proceedings. When questioned during the termination hearing whether she or anyone at the agency had had any contact with Father, Williams responded, "I have not, no." *Tr*. at 13. When asked, "If [Father] had come forward for services, would you have made those available to him?" Williams answered, "Yes." *Id*. at 14. Because Father failed to avail himself of any and all services available to him both through the LCDCS and the

correctional facility where he was housed, his ability to properly parent L.B. once released from prison remains unknown.

Based on the foregoing, we cannot say the juvenile court committed clear error when it found there was a reasonable probability the conditions resulting in L.B.'s removal and continued placement outside Father's care will not be remedied. *See Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding trial court did not commit clear error in determining conditions leading to child's removal from father would not be remedied where father, who had been incarcerated throughout CHINS and termination proceedings remained incarcerated at time of termination hearing and was not expected to be released for several years), *trans. denied.* Accordingly, we find no error.

We conclude that Father was not denied his constitutional right to due process when the juvenile court did not appoint counsel to represent him during the CHINS and termination proceedings. Further, the LCDCS established by clear and convincing evidence the requisite statutory elements to support the involuntary termination of Father's parental rights to L.B.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.